

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEAGUE FOR COASTAL PROTECTION, et  
al.,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the  
Interior, et al.,

Defendants.

No. C 05-0991-CW

ORDER DENYING  
DEFENDANTS'  
MOTION TO STAY  
PENDING APPEAL  
AND GRANTING  
PLAINTIFFS'  
MOTION TO ENFORCE  
FEE AWARDS

On December 22, 2006, the Court awarded Plaintiffs \$185,230.18 in interim attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A). On March 29, 2007, the Court awarded Plaintiffs an additional \$11,200 for their attorney time incurred recovering attorneys' fees and costs. Defendants move, pursuant to Federal Rule of Civil Procedure 62, to stay the Court's orders awarding Plaintiffs attorneys' fees and costs. Plaintiffs oppose that motion and have filed a motion to enforce the fee awards. Defendants oppose Plaintiffs' motion. The matter was decided on the papers. Having considered the parties'

1 papers, the Court denies Defendants' motion and grants Plaintiffs'  
2 motion.

3 BACKGROUND

4 On August 31, 2005, the Court granted Plaintiffs' motion for  
5 summary judgment, finding that Defendants had failed to comply  
6 fully with the National Environmental Policy Act. Defendants filed  
7 a timely notice of appeal. However, Defendants successfully moved  
8 to stay that appeal, pending the outcome of Amber Resources Co. v.  
9 United States. Plaintiffs state that, based on the proceedings in  
10 Amber Resources, it is unlikely that the appeal of this Court's  
11 summary judgment order will be resolved until at least 2009, if not  
12 later.

13 On December 22, 2006, the Court ordered Defendants forthwith  
14 to pay Plaintiffs \$185,230.18 in interim attorneys' fees and costs.  
15 They did not. On February 20, 2007, Defendants filed a notice of  
16 appeal of that order. Approximately a month later, the Court  
17 awarded Plaintiffs an additional \$11,200, again rejecting  
18 Defendants' argument that any request for attorneys' fees and costs  
19 was premature because an appeal is pending. Defendants also filed  
20 a notice of appeal of that order. They have not paid Plaintiffs  
21 any of the \$196,430.18 award to which Plaintiffs are entitled.

22 DISCUSSION

23 Defendants argue that, pursuant to Federal Rule of Civil  
24 Procedure 62, they are entitled to a stay of the Court's awards of  
25 attorneys' fees and costs. Plaintiffs disagree and argue that the  
26 Court should, once again, order Defendants to pay their attorneys'  
27 fees and costs.

1 Rule 62 addresses a stay of proceedings to enforce a judgment.  
2 Subdivision (d) of the Rule provides that, subject to certain  
3 exceptions, when an appeal is taken, the appellant may obtain a  
4 stay of execution by posting a supersedeas bond: "a party taking an  
5 appeal from the District Court is entitled to a stay of a money  
6 judgment as a matter of right if he posts a bond in accordance with  
7 Fed. R. Civ. P. 62(d)." Am. Mfrs. Mut. Ins. Co. v. Am.  
8 Broadcasting-Paramount Theatres, Inc., 87 S. Ct. 1, 3 (1966).

9 Subdivision (e) of the Rule provides that, when an appeal is taken  
10 by the United States "or by direction of any department of the  
11 Government of the United States and the operation or enforcement of  
12 the judgment is stayed, no bond, obligation, or other security  
13 shall be required from the appellant." Fed. R. Civ. P. 62(e).

14 Some courts have interpreted Rules 62(d) and (e) together,  
15 concluding that, when the United States moves for a stay of a money  
16 judgment pending appeal, it is entitled to a stay as a matter of  
17 right, and is not required to post a bond. See, e.g., Hoban v.  
18 Washington Metropolitan Area Transit Auth., 841 F.2d 1157, 1159  
19 (D.C. Cir. 1988) (finding one must read Rule 62(e) "in tandem with"  
20 Rule 62(d)); In re Mgndichian, 2003 WL 23358199 (C.D. Cal.). Other  
21 courts have not. In In re Westwood Plaza Apartments, Ltd., 150  
22 B.R. 163, 166 (E.D. Tex. 1993), for example, the court concluded,  
23 "Subdivision (e) is complete and not dependent on subdivision (d).  
24 The second condition of subdivision (e) is not worded as to provide  
25 an appeal as a matter of right as the first sentence to  
26 subdivision (d) does. It only states that a bond need not be  
27 posted if a stay is granted in favor of the United States." But,

1 as Defendants point out, it appears that the weight of authority  
2 concludes that the United States is entitled to a stay of a money  
3 judgment as a matter of right.

4 Plaintiffs do not argue otherwise. Indeed, Plaintiffs do not  
5 address whether Rules 62(d) and (e) should be read together.  
6 Rather, they argue that the Court's award of attorneys' fees and  
7 costs is not a money judgment and, therefore, there is no stay as a  
8 matter of right. They note that, in Poole v. Rourke, 779 F. Supp.  
9 1546, 1560 (E.D. Cal. 1991), the court concluded that EAJA fee  
10 awards are "more akin to specific relief than to money damages,"  
11 because they are necessarily incidental to efforts to secure other  
12 relief. And, in Stone v. City and County of San Francisco, 145  
13 F.R.D. 553, 561 (N.D. Cal. 1993), the court found that the stay as  
14 a matter of a right for money judgments provided in Rule 62(d) does  
15 not apply to a fee award that is "more closely analogous to an  
16 injunctive decree than it is to an award of money damages."  
17 Nonetheless, although these cases support Plaintiffs' argument,  
18 they are not directly on point.

19 In re Mgndichian, cited by Defendants, is more on point.<sup>1</sup>  
20 There, the United States sought a stay of the court's order  
21 awarding the petitioner attorneys' fees. The court concluded that  
22 the government was entitled to a stay pending appeal as a matter of  
23 right and stayed its order until appellate proceedings were  
24 resolved and final. 2003 WL 23358199, \*2. This case, however, is  
25

---

26 <sup>1</sup>Although Defendants provided a copy of this unpublished order  
27 with their moving papers, Plaintiffs do not address it in their  
28 papers.

1 not binding on the Court. More importantly, In re Mgndichian does  
2 not address whether an attorneys' fees award is a money judgement  
3 under Rule 62. It is not clear whether that issue was even raised  
4 before the court. Therefore, In re Mgndichian is not persuasive  
5 concerning whether the attorneys' fees and cost award is subject to  
6 the stay as a matter of right provision of Rule 62(d).

7 Although Plaintiffs have cited no case that finds that  
8 attorneys' fees and costs, such as those awarded here, are not a  
9 money judgment under Rule 62, the cases they cite support their  
10 argument, which the Court finds persuasive. Defendants cite no  
11 case requiring the Court to find otherwise. The Court will not  
12 apply the term "money judgment" so broadly as to encompass  
13 attorneys' fees and costs that were incurred while seeking the  
14 injunctive relief at issue in this case. See Stone, 145 F.R.D. at  
15 558-61 (contrasting contempt order imposing fines with "money  
16 damages" subject to a Rule 62(d) stay as a matter of right).  
17 Following Stone's recognition that monetary relief responsive to  
18 equitable concerns is not subject to Rule 62(d)'s stay as a matter  
19 of right, the Court finds that a stay as a matter of right is not  
20 warranted here.

21 Nonetheless, a discretionary stay may be warranted; Defendants  
22 argue that it is. The Supreme Court instructs that the factors  
23 regulating the issue of a stay are as follows:

- 24 (1) whether the stay applicant has made a strong showing that  
25 he is likely to succeed on the merits; (2) whether the  
26 applicant will be irreparably injured absent a stay;  
27 (3) whether issuance of the stay will substantially injure the  
28 other parties interested in the proceeding; and (4) where the  
public interest lies.

1 Hilton v. Braunskill, 481 U.S. 770, 776 (1987). As the Ninth  
2 Circuit explains, "The standard for evaluating stays pending appeal  
3 is similar to that employed by district courts in deciding whether  
4 to grant a preliminary injunction." Lopez v. Heckler, 713 F.2d  
5 1432, 1435 (9th Cir. 1983).

6 In awarding Plaintiffs attorneys' fees and costs under EAJA,  
7 the Court found that Defendants' position was not substantially  
8 justified; Defendants have not made a strong showing that they are  
9 likely to succeed on appeal. Nor have they raised any "serious  
10 legal questions" as to the propriety of the Court's summary  
11 judgment ruling. See Lopez, 713 F.2d at 1435. Defendants'  
12 speculation that they may not be able to recover fees and costs  
13 paid to Plaintiffs' attorneys in the event of a successful appeal  
14 does not establish irreparable harm. The balance of hardships does  
15 not tip in Defendants' favor.

16 A stay is not warranted. The Court will not exercise its  
17 discretion to grant Defendants' request for a stay pending appeal.  
18 Nor will it require Plaintiffs to post a bond as a prerequisite to  
19 receiving their fee awards. Unlike Defendants' motion for a stay,  
20 Plaintiffs' motion for enforcement of the awards of attorneys' fees  
21 and costs has merit. The Court again orders Defendants forthwith  
22 to pay Plaintiffs' attorneys' fees and costs.

23 CONCLUSION

24 For the foregoing reasons, Defendants' Motion for Stay Pending  
25 Appeal of Awards of Attorneys' Fees and Costs (Docket No. 73) is  
26 DENIED. Plaintiffs' Motion to Enforce Fee Awards (Docket No. 75)

1 is GRANTED. Within thirty days from the date of this order,  
2 Defendants shall pay Plaintiffs' attorneys \$196,430.18.

3 IT IS SO ORDERED.

4  
5 Dated: 7/2/07



---

CLAUDIA WILKEN  
United States District Judge